



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Patent No. 6,290,976 \

Issued: September 18, 2001

Application Serial No. 09/544,636

Name of Patentee: Messenger, Donna

Atty. Doc. No. 120-095

Title of Invention: FACIAL SKIN DERMABRASION CLEANSING AND CONDITIONING
COMPOSITION

Honorable Director of Patents and Trademarks
P.O. Box 1450
Alexandria, VA 22313

PETITION FOR CORRECTION OF INVENTORSHIP OF PATENT
(37 C.F.R. § 1.324)

S I R:

This is a petition for the correction of an error of nonjoinder for a co-inventor in the above issued patent. We respectfully request that the PTO issue a certificate correcting the error.

We petition the Commissioner under unusual circumstances. The sole named inventor of the patent and the assigned owner of the entire right and interest of the patent have been involved in litigation in the District Court for the Southern District of New York. On May 21, 2003, the Court ordered that Ms. Messenger execute a written assignment of the pending patent application that resulted in the '976 patent to the Plaintiff, Bella Bella, Inc. ("BBI") (See Default Judgment at p 2, attached as Exhibit 1). This assignment has been executed and recorded with the United States Patent and Trademark Office at reel number 013813, frame number 0783.

On December 15, 2006, Magistrate Judge Katz issued a Report and Recommendations ("the Report" attached as Exhibit 2) recommending that the Court enter default judgment against Defendant in the amount of \$57,072.00 and set forth the facts established to prove that Ms. Lynn

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Lucka, a founder and currently the sole owner of plaintiff/assignee BBI, should have been named as a co-inventor of the '976 patent. These facts include that Ms. Lucka was the principal inventor and driving force behind the development and manufacture of a skin care product sold under the CRYSTAL CLARITY trademark. BBI owns all rights to any formulae and inventions relating to CRYSTAL CLARITY. Ms. Messenger represented to Ms. Lucka that she would retain an attorney on behalf of BBI to file a patent application naming both Ms. Lucka and Ms. Messenger to protect, *inter alia*, the CRYSTAL CLARITY product. Instead, the attorney retained on BBI's behalf, at Ms. Messenger's direction, filed a patent application which failed to name Ms. Lucka as a co-inventor. Ms. Messenger had no legal or equitable right to file the patent application in her own name, and by doing so, she violated her fiduciary duty to BBI by transferring corporate assets, including the patent application to herself. (See Exhibit 2 at pp 3-4).

Unfortunately, on page 4, n.2, of the Report, Magistrate Judge Katz notes that "[i]t does not appear that the patent ever issued." This statement is in error, and is perhaps, the only reason why the Magistrate did not award the requested relief (i.e., co-inventorship) at that time.

We respectfully petition the Commission to correct the inventorship of the patent.

The fee of \$130.00 as required under § 1.20(b) is enclosed as a check.

Respectfully submitted,

Dated: 4/20/07

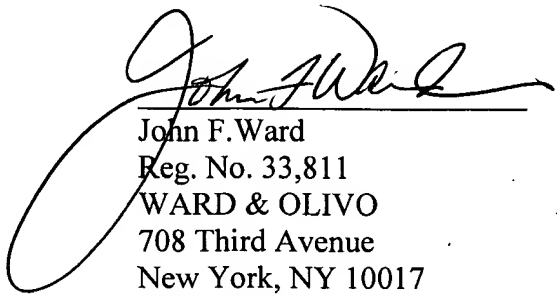
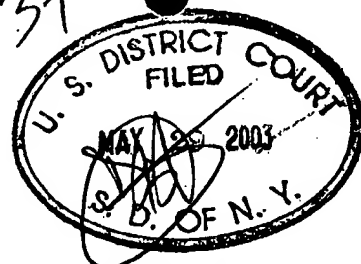

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EXHIBIT 1

5/29/03

Doc # 31



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BELLA BELLA, INC.,
Plaintiff,
-against-
DONNA MESSENGER,
Defendant.

Index No.: 00 Civ. 7369 (KMW)

ORDER Default Judgment

WOOD, U.S.D.J.:

~~By Order of this Court dated April 14, 2003,~~ ⁹ A hearing was held on April 25, 2003, at which time Paul Goodman, Esq., counsel for the Defendant, ^{stated that he had no objection to} ~~agreed to~~ a Default Judgment being entered against his client. ~~Since the Defendant was not then present in Court, said hearing was adjourned to April 29, 2003, and Mr. Goodman was Ordered to have his client present for the adjourned hearing.~~ The Court ordered that a Default Judgment would be entered.

A second hearing was held in this matter on April 29, 2003, at which both Defendant and her counsel, Mr. Goodman, were present. ~~At this hearing Defendant's counsel submitted an Affidavit attesting to letters he had allegedly written to Magistrate Judge Katz in this matter. After considering this Affidavit, this Court again concluded that entry of a Default Judgment against the Defendant was appropriate. Defendant's counsel then explained to her what entry of a Default Judgment would entail, including, without limitation, a requirement for the Defendant to assign to the Plaintiff the Trademark "CRYSTAL CLARITY" and the pending Patent Application set forth in the Complaint, monetary damages to be determined at an Inquest Hearing to be held at a later date, and a permanent injunction forever forbidding the Defendant to continue to utilize the Trademark "CRYSTAL CLARITY" in any manner whatsoever. After~~

The parties discussed the scope of the Default Judgment. To ensure that any such Judgment conformed with the relief sought in this action, the Court requested that plaintiff's counsel draft a proposed

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Default Judgment, and provided defendant with an opportunity to respond. Defendant did not object to or comment upon the proposed ~~said explanation by her counsel, the Defendant, through her counsel, agreed to the entry of a~~ Default Judgment against her for all of the relief sought in the Complaint. - xmw
Default Judgment.

On the basis of the foregoing, it is hereby Ordered that a Default Judgment be entered in favor of the Plaintiff and against the Defendant in this case as follows:

1. The Defendant shall execute and deliver to Plaintiff's counsel, William R. Horner, Esq., on or before June 13, 2003, written assignments in the form designated by the United States Patent and Trademark Office of the Trademark Registration for "CRYSTAL CLARITY" and the pending Patent Application # heretofore filed by the Defendant; and - xmw

2. The Defendant's conduct set forth in the Complaint is determined to: (a) violate the provisions of New York Gen. Bus. Law §§ 349, 360-1, and 133 and constitutes trademark infringement, trademark dilution, and unfair competition under the laws of the State of New York; and (b) violate the New York Business Corporation Law by breaching Defendant's fiduciary duties and the duties of good faith and fair dealing to Plaintiff, thus usurping the corporate opportunities of Plaintiff in violation of the common law and Statutes of the State of New York; and

3. In order to determine the economic damage suffered by Plaintiff as a result of the foregoing violations by Defendant, Plaintiff may conduct such discovery as permitted under the Federal Rules of Civil Procedure, including, without limitation, demands for production of documents, interrogatories, and depositions of Defendant and others acting in concert with or aiding the Defendant in violating the rights of Plaintiff, and Defendant shall fully and completely comply with all such discovery requests made by Plaintiff on or before June 13, 2003; and - xmw

4. Within 30 days after completion of such discovery an Inquest Hearing shall be held before Magistrate Judge Katz to determine the amount of monetary damages due to Plaintiff from Defendant, ~~which damages shall be trebled in accordance with the law, and~~ ⁹ ~~law, and~~ -kmw

5. ~~There shall be added to such damages the full cost incurred by Plaintiff in this action,~~ ^{Judge Katz shall also determine whether} ~~(s)~~ including reasonable attorneys' fees and interest from the date of the commencement of this action to the date final damages ~~are determined at the statutory rate set forth in New York Law;~~ ^{are determined, should be awarded.} and -kmw

6. ~~The Defendant and her counsel, Paul Goodman, Esq., shall pay the sanctions heretofore imposed against them by Magistrate Judge Katz on or before Friday, May 2, 2003, failing which additional sanctions in the amount of One Hundred Dollars (\$100.00) per day are hereby imposed against both of them from that date until such time as the said sanctions are paid;~~ ^{and} -kmw

7. The Defendant shall deliver to Plaintiff's counsel IMMEDIATELY, ^{if she has not done so already,} ~~2003,~~ complete copies of the records of: (a) both her personal checking account(s) and the checking account of Defendant's Florida corporation Donna Messenger, Inc., and (b) complete copies of the records of the credit card processing company for all product orders made on and through the Defendant's Website, "Crystal Clarity;" and -kmw

8. Defendant and her company Donna Messenger, Inc., and their agents, servants, employees, successors and assigns, and all others in active concert or participation with them are permanently enjoined from directly or indirectly: (a) using the Registered Trademark "CRYSTAL CLARITY." or any other marks which are similar to or are colorable imitations of the said Trademark, alone or as a part of or together with any other designs, word or words,

trademark, service mark, trade name, ^{trade - kmw} trade dress or other business or commercial designation or any logo, symbol or design; and (b) committing any act which, in and of itself, or from the manner or under the circumstances in which it is done amounts to false designation of origin, false description or false representation of Defendant's goods; and (c) otherwise unfairly competing with Plaintiff or committing dilution or infringement of Plaintiff's Trademark or Patent rights; and

9. Defendant is directed to file with this Court and serve on Plaintiff ^{by June 23, 2003, kmw} ~~within thirty (30)~~ days after the date hereof a report in writing and under oath setting forth in detail the manner and form in which the Defendant has complied with the foregoing permanent injunction; and

10. Defendant is hereby required to notify all of her commercial associates, suppliers, and customers of the permanent injunction hereby entered against her and her company Donna Messinger, Inc.; and

11. ~~Punitive Damages in the amount of \$~~ _____ ~~are hereby awarded to~~ Plaintiff against Defendant to deter Defendant from breaching the permanent injunction set forth ~~hereinabove; and~~ Judge Katz shall determine whether any punitive damages are warranted. - kmw

12. The Court shall retain jurisdiction of this action for the purpose of enabling Plaintiff ^{and - kmw} to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the interpretation or execution of any order entered in this action, for the modification of any such order, for the enforcement or compliance therewith, and for the punishment of any violations thereof. Defendant

SO ORDERED.

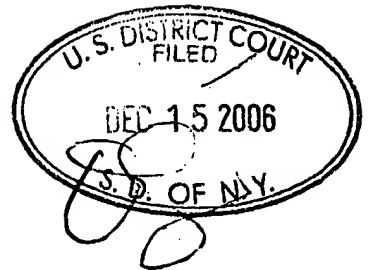
Dated: New York, New York
May 21, 2003

Kimba M. Wood
KIMBA M. WOOD
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 6/3/03

EXHIBIT 2

#77



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BELLA BELLA, INC.,

Plaintiff,

: 00 Civ. 7369 (KMW) (THK)

-against-

:
: **REPORT AND**
: **RECOMMENDATION**
:

DONNA MESSENGER,

Defendant.
-----X

TO: Hon. Kimba M. Wood, United States District Judge.
From: Theodore H. Katz, United States Magistrate Judge.

Plaintiff Bella Bella, Inc. ("BBI") brought this action against Defendant Donna Messenger, an officer and shareholder in the Plaintiff company, for, inter alia, breach of fiduciary duty, self-dealing, and trademark infringement relating to skin cream sold under the trademark "CRYSTAL CLARITY." Plaintiff's claims were based on federal and New York State law. After an extremely contentious period of thwarted pretrial discovery, a default judgment was entered against Defendant for her failure to comply with Court orders. (See Default Judgment, dated May 21, 2003 ("Default J.")) The action was then referred to this Court for an inquest on damages. With the Court's assistance, on March 30, 2005, the parties entered into a settlement agreement and, on June 28, 2005, a Stipulation of Discontinuance was so-ordered by the District Court (Wood, J.). (See Stipulation and Order, dated June

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28, 2005.) The Stipulation provided: "In the event that the Defendant does not cure [a breach of the Stipulation] within ten days of the notification to [defense counsel], then, in any such event, the Plaintiff may request that Judge Wood reopen this matter for the purposes of determining the damages owed by the Defendant to the Plaintiff as set forth in paragraphs 3-7 of the Default Judgment." Subsequently, Plaintiff notified the Court that Defendant had failed to abide by the terms of the settlement agreement by failing to make required payments to Plaintiff, and requested that the case be reinstated for the purpose of determining Plaintiff's damages.

The case was reopened and again referred to this Court for an inquest on damages. On December 5, 2005, as directed by the Court, Plaintiff submitted Revised Findings of Fact and Conclusions of Law ("Pl.'s Revised Findings"), in anticipation of the inquest. Although instructed to respond to that submission, Defendant failed to do so. On December 19, 2005, an inquest was held, at which Ms. Lynn Lucka - a partner in, and officer of, BBI - testified. Defendant failed to appear at the inquest, although her attorney was present and cross-examined Ms. Lucka. Defendant's counsel also stipulated on the record as to those facts in Plaintiff's Revised Findings that were disputed and those that were conceded.

Based upon the testimony and evidence submitted at the inquest, the Court recommends that a Default Judgment be entered

against Defendant Donna Messenger in the amount of \$57,072.00.

DISCUSSION

I. Established Facts and Liability

The Default Judgment that was entered in this case established, inter alia, that Defendant's conduct, as set forth in the Complaint, is determined to:

(a) violate the provisions of the New York Gen. Bus. Law §§ 349, 360-1, and 133 and constitutes trademark infringement, trademark dilution, and unfair competition under the laws of the State of New York; and (b) violate the New York Business Corporation Law by breaching Defendant's fiduciary duties and the duties of good faith and fair dealing to Plaintiff, thus usurping corporate opportunities of Plaintiff in violation of the common law and statutes of the State of New York.

(Default J. ¶ 2.)

The conduct which was set forth in the Complaint was as follows: Ms. Lucka, as President and Treasurer of BBI, and Ms. Messenger, as Vice-President and Secretary of BBI (See Compl. ¶ 11), organized BBI in 1999 for "the business of developing, having manufactured, marketing, offering for sale, and selling skin care products." (Complaint ("Compl.") ¶ 13.)¹ BBI, with the assistance of another firm, developed and manufactured a skin care product sold under the "CRYSTAL CLARITY" trademark (the "Trademark"), which

¹ Ms. Messenger had been a skin care specialist, performing such procedures as skin peels and dermaplaning. (See Deposition of Donna Messenger, dated Sept. 16, 2003 ("Messenger Dep."), at 16.) Ms. Lucka was a client of Defendant, and they became friends. (See Transcript of Inquest, dated Dec. 19, 2005 ("Tr."), at 34.)

is owned by BBI. BBI also owns all rights to any formulae and inventions relating to CRYSTAL CLARITY. (See id. ¶¶ 15-17.)

Defendant represented to Lucka that she would retain an attorney on behalf of BBI to file for trademark protection for the "CRYSTAL CLARITY" trademark, and patent protection for the product. Defendant then retained an attorney to file a trademark application with the United States Patent and Trademark Office, but, at Defendant's direction, the attorney filed for the Trademark in Defendant's name personally. (See id. ¶¶ 23-24.) In her application for registration of the Trademark, Defendant represented that she personally intended to use the mark in interstate commerce, and she has in fact done so, thus selling goods which were actually the property of BBI. (See id. ¶¶ 25-26.) In addition, the attorney retained on BBI's behalf, again at Defendant's direction, filed a patent application, in Defendant's name personally, for the invention relating to BBI's CRYSTAL CLARITY product. (See id. ¶ 28.)²

Defendant had no legal or equitable right to use or own the Trademark (see id. ¶ 36), and had no legal or equitable right to file the patent application in her own name (see id. ¶ 50). By her conduct, Defendant infringed Plaintiff's Trademark and willfully and deceptively misled the public into believing that the product she was selling was affiliated with or controlled by BBI,

² It does not appear that the patent ever issued.

thus benefitting from BBI's reputation and placing that reputation at risk. (See id. ¶ 30.) Defendant violated her fiduciary duty to BBI by transferring corporate assets to herself, including the Trademark, the patent application, and the product she sold under the Trademark, as well as by usurping BBI's corporate opportunities. (See id. ¶¶ 53-59.)

II. Damages

As has been true throughout this tortured litigation, the parties' inquest submissions have been of little assistance to the Court. As an initial matter, no fewer than three submissions have been provided by Plaintiff with respect to proposed findings of fact and conclusions of law: Findings of Fact and Conclusions of Law, dated February 11, 2005; Revised Findings of Fact and Conclusions of Law, dated December 6, 2005;³ and Supplemental Conclusions of Law, dated December 30, 2005. Some of the Proposed Conclusions of Law address to damages for federal trademark and infringement and patent infringement, and others are based on Plaintiff's state law claims relating to breach of fiduciary duty, unfair competition, trademark infringement and dilution, and usurpation of corporate opportunities.

At the inquest, the Court pointed out that Plaintiff must tie the damages being sought to the legal claims that have been

³ It is unfathomable at this point why Plaintiff's revised findings pre-date the original findings.

established as a result of the Default Judgment, and there was an extended colloquy with counsel on that subject. (See Tr. at 53-60.) Plaintiff's counsel essentially conceded, in response to Defendant's contention that there was no claim for patent infringement in the Complaint, that there was no need for the Court to award damages on the basis of infringement of the patent. (See id. at 58.) As to the federal trademark infringement claims under the Lanham Act, Plaintiff appears to contend that because there was a default judgment entered, Defendant's liability is established on that claim. (See Tr. at 55-56.) Alternatively, Plaintiff argues that the damages for the state law violations would be exactly the same as the federal claim damages. (See id. at 57.)

Regardless of the claims set forth in the Complaint, the Default Judgment simply establishes Defendant's liability with respect to various state law claims. While a default judgment obtained where a party has failed to appear in an action usually establishes liability on the basis of the well-pleaded allegations in the Complaint, see Bambu Sales, Inc. v. Ozak Trading Inc., 58 F.3d 849, 854 (2d Cir. 1995); S.E.C. v. Mgmt. Dynamics, Inc., 515 F.2d 801, 814 (2d Cir. 1975), in this case a specific Default Judgment was entered with Defendant's consent. Moreover, the Default Judgment was drafted by Plaintiff's counsel. Thus, the terms of that Default Judgment govern what liability has been established and the basis for any award of damages. Here, the

consumer protection statute, prohibits any deceptive acts or practices in conducting a business. See Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 323, 746 N.Y.S.2d 858, 863 (2002) ("New York's Consumer Protection Act [Gen. Bus. L. § 349] was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices."). Although courts have extended the protections of Section 349 to competitors as well as consumers, the gravamen of the complaint must be a deceptive act or practice which has or is likely to cause consumer injury or harm. See Boule v. Hutton, 328 F.3d 84, 94 (2d Cir. 2003) ("Section 349 . . . allows recovery not only by consumers, but also by competitors if there is some harm to the public at large.") (internal quotations marks omitted) (citing Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995)); Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 344, 704 N.Y.S.2d 177, 182-83 (1999) (as opposed to a private dispute, to challenge a practice under Section 349 it must have a broader impact on consumers at large). As in this case, "[c]ourts in this District routinely reject claims brought under § 349 where a commercial claimant does not adequately allege harm to the public interest. . . . Claims that arise out of a trademark infringement action, and disputes between competitors where the core of the claim is harm to another business as opposed to consumers, both constitute situations which courts have found to reflect a public harm that is

CLARITY Trademark, and palming-off her goods as those of BBI, Defendant infringed Plaintiff's Trademark under the common law of New York, engaged in unfair business practices, and deprived Plaintiff of the sale of its own goods. (See Compl. ¶¶ 43-45.)

None of these violations, however, serves as a proper basis for the award of damages to Plaintiff. Section 133 of the General Business Law prohibits a person or corporation from assuming or using as part of its corporate name the name, symbol, or designation of another corporation, with the intent to deceive or mislead the public as to the identity of the person or corporation or its connection to the other company. See N.Y. Gen. Bus. L. § 133. Leaving aside the issue of whether this statute is intended to address the improper use of a trademark that is not part of the name of a corporation, such as CRYSTAL CLARITY (Plaintiff's name, BBI, in no way incorporates the CRYSTAL CLARITY mark), on its face the statute merely allows for injunctive relief and prosecution for a misdemeanor. See N.Y. Gen. Bus. L. § 133 ("Whenever there shall be an actual or threatened violation of this section, an application may be made to a court . . . to issue an injunction . . . to enjoin and restrain such actual or threatened violation."). Indeed, Plaintiff appears to have recognized this limitation, as it invoked Section 133 in the Complaint to secure injunctive relief. (See Compl. ¶ 41.)

Section 349 of the General Business Law, which is New York's

Default Judgment establishes liability merely on Plaintiff's state law claims. (See Default J. ¶ 2.) Accordingly, the law governing damages based on those claims controls.⁴

Plaintiff seeks as damages the profits Defendant reaped through the sale of CRYSTAL CLARITY, and any revenues she earned performing facial procedures in her private clinic in Florida and at physicians' offices in New York. Plaintiff requests that these damages be trebled, and that it also be awarded the attorneys' fees and costs it incurred in prosecuting this action.

A. Trademark Infringement and Dilution

It has been established by the Default Judgment that Defendant used the CRYSTAL CLARITY Trademark in connection with the sale of skin care products that were the property of BBI. (See Compl. ¶¶ 26-27.) This conduct was likely to injure the business reputation of BBI and to dilute the CRYSTAL CLARITY Trademark, in violation of New York General Business Law § 360-1. (See Compl. ¶ 40; Default J. ¶ 2.) In addition, by causing the public to believe that Defendant and her infringing goods were affiliated with, or sponsored by, BBI, Defendant engaged in deceptive practices in violation of New York General Business Law §§ 133 and 349. (See Complaint ¶¶ 39, 41; Default J. ¶ 2.) Finally, by selling goods under the CRYSTAL

⁴ The Default Judgment provided injunctive relief as well, requiring Defendant, inter alia, to assign the Trademark registration and patent application to BBI and to cease using the Trademark. (See Default J. ¶¶ 1, 8.)

too insubstantial to satisfy the pleading requirements of § 349." Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003) (citing cases); cf. Goshen, 98 N.Y.2d at 326, 746 N.Y.S.2d at 864 (as to General Business Law § 349, "[t]he origin of any advertising or promotional conduct is irrelevant if the deception itself . . . did not result in a transaction in which the consumer was harmed"). In the Complaint at issue, no harm to the public is alleged; the only harm Plaintiff has claimed is harm to its own business. Accordingly, Section 349 does not provide a basis for the award of damages.⁵

Finally, Section 360-1 of the General Business Law, which addresses injury to business reputation and dilution of a distinctive mark, provides only for injunctive relief, as Plaintiff itself recognized in the Complaint. See Compl. ¶ 40; N.Y. Gen. Bus. L. § 360-1 ("Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be ground for injunctive relief in cases of infringement of a mark . . . or in cases of unfair competition. . . ."). Although Plaintiff relies upon New York General Business Law § 360-m for its

⁵ Even if Plaintiff had stated a viable claim under Section 349, it did not provide sufficient evidence to allow for an award of damages under that provision. Under this statute, "the transaction in which the consumer is deceived must occur in New York." Goshen, 98 N.Y.2d at 324, 746 N.Y.S.2d at 863. Plaintiff contends that Defendant sold CRYSTAL CLARITY over the internet, at her practice in Florida, as well as at physicians' offices in New York. There is no evidence as to what quantities were sold in which locations.

claim to treble damages and attorneys' fees resulting from Defendant's trademark infringement, that provision provides remedies only to owners of trademarks registered under New York's General Business Law. See N.Y. Gen. Bus. L. § 360-m ("Any owner of a mark registered under this article may proceed by suit . . ."). Defendant argues, the Complaint alleges, and Plaintiff does not dispute, that the CRYSTAL CLARITY mark was registered with the United States Patent and Trademark Office, and was never registered under the provisions of the New York General Business Law. (See Compl. ¶¶ 24 and page 10; N.Y. Gen. Bus. L. §§ 360-a, b, & c.) Accordingly, this provision cannot serve as a basis for the award of damages or attorneys' fees to Plaintiff.

B. Breach of Fiduciary Duty

The Default Judgment establishes that Defendant's conduct, set forth in the Complaint, resulted in a breach of her fiduciary duties to Plaintiff and usurped Plaintiff's corporate opportunities. (See Default J. ¶ 2.) The conduct that is alleged in the Complaint is that Defendant improperly registered the CRYSTAL CLARITY mark in her own name, rather than BBI's, filed a patent application for BBI's skin care products, also in her own name, and used the CRYSTAL CLARITY name in connection with the sale of goods that belonged to Plaintiff. (See Compl. ¶¶ 23-28, 53-55.)

Defendant was both an officer and director of BBI. Section 715 of the New York Business Corporation Law provides, in pertinent

part, that "[a]n officer of a corporation shall perform his duties as an officer in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." N.Y. Bus. Corp. L. § 715(h). Section 717 of the Business Corporation Law requires that "[a] director shall perform his duties . . . in good faith and with the degree of care which an ordinarily prudent person in like position would use under similar circumstances." N.Y. Bus. Corp. L. § 717(a). Pursuant to the Business Corporation Law, an action may be brought against an officer or director of a corporation for, inter alia, "violation of his duties in the management and disposition of corporate assets," and "the acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect, of failure to perform, or other violation of his duties." N.Y. Bus. Corp. L. §§ 720(A) and (B).

There can be little question that Defendant's misuse of Plaintiff's corporate assets for her personal gain was a breach of her fiduciary duty to BBI. See Am. Fed. Group v. Rothenberg, 136 F.3d 897, 905 (2d Cir. 1998) ("[O]ne who . . . is a[n] officer and director of a closely held corporation, is under a duty to deal fairly, in good faith, and with loyalty to the corporation and other shareholders. This requires that he exert his best efforts in behalf of the corporation and not compete with it or profit at its expense, or place his private interests in conflict with it.")

(citations and internal quotation marks omitted); Wisell v. Indo-Med Commodities, Inc., 11 Misc. 3d 1089 at *7, 819 N.Y.S.2d 852 (Nassau Cty. Sup. Ct. 2006) ("[i]n taking and utilizing the assets of [plaintiff] including its inventory, . . . and converting them to his sole advantage and to the detriment and derogation of the corporation of which he was president warrants a finding of a breach of . . . fiduciary duty. . . .")

1. Defendant's Profits from Sale of CRYSTAL CLARITY

It is undisputed that Defendant sold CRYSTAL CLARITY for her own benefit rather than for the benefit of Plaintiff BBI. Moreover, CRYSTAL CLARITY was an asset of BBI's, which Defendant had an obligation to exploit for the benefit of BBI. "Where . . . an officer has been found to have diverted corporate assets . . . , he may be held liable for the fruits of his wrongdoing." Wolff v. Wolff, 67 N.Y.2d 638, 641, 499 N.Y.S.2d 665, 667 (1986). In seeking to recover lost earnings or profits, as Plaintiff is here (see Supplemental Conclusions of Law ¶ 6; Compl. ¶ 1), "one must prove with certainty that the loss resulted from the breach." Am. Fed. Group, 136 F.3d at 907.

There is no doubt that Plaintiff's loss of sales revenue was a direct result of Defendant's sale of BBI's product - CRYSTAL CLARITY - for her own benefit. Plaintiff is therefore entitled to recover the profits Defendant made in selling CRYSTAL CLARITY. It is undisputed that Defendant sold the product over the Internet, in

. . . the burden of uncertainty as to the amount of damage is upon the wrongdoer." Schonfeld v. Hilliard, 218 F.3d 164, 175 (2d Cir 2000) (quoting Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977)); cf. Travellers Int'l, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1577 (2d Cir. 1994) ("any calculation of damages based on lost profits always entails a degree of uncertainty caused by the need to rely on assumptions and estimates."); Sensonics, Inc. v. Aerosonic Corp., 81 F.3d 1566, 1572 (Fed. Cir. 1996) (where defendant failed to retain production records during litigation period, district court drew strong adverse inference that records would have been unfavorable to defendant); Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065 (Fed. Cir. 1983) ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931))); Randall-Smith, Inc. v. 43rd St. Estates Corp., 17 N.Y.2d 99, 106, 268 N.Y.S.2d 306, 312 (1966) ("A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he caused is uncertain."). Nevertheless, the Court "is not allowed to base its award on speculation or guesswork." Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033, 1038 (2d Cir. 1992); accord Sands v.

Runyon, 28 F.3d 1323, 1330 (2d Cir. 1994).

Here, it has been sufficiently established that Defendant purchased ten pounds of microdermabrasion crystal between October 2002 and May 2003, and that each two ounce container of CRYSTAL CLARITY contained one-half ounce of the crystal. (See Tr. at 8-9; Pl.'s Ex. 2 ¶ 4.) Thus, the ten pounds of crystal that Defendant purchased during those eight months were sufficient to produce 320 containers of the product, averaging out to forty containers per month. Moreover, it is reasonable to assume that Defendant exhausted all ten pounds of crystal she had purchased by selling CRYSTAL CLARITY because Defendant continued to order the crystal after January of 2003. (See Messenger Dep. at 25.) Each container of crystal sold for \$50. (See Tr. at 9.) The only evidence of Defendant's cost of production is her payment of forty cents for each container in which CRYSTAL CLARITY was sold, and approximately forty cents per container for the crystal. (See Tr. at 20-21; Pl.'s Exs. 1 & 2.)⁷ Therefore, Defendant's net profit on the sale of each \$50 container was \$49.20.⁸ Assuming Defendant sold 320 containers of the product between October 2002 and May 2003, her

⁷ Each pound of crystal cost \$8. (See Pl.'s Ex. 1.) Thus, each half ounce, the amount of crystal in each container of CRYSTAL CLARITY, cost forty cents.

⁸ Defendant made the product in her home, so it appears that there were no other costs of production. In any event, she has failed to produce evidence of any other costs, and the burden of proof as to such costs rests with Defendant.

net profit would have been \$15,744.

Plaintiff asks the Court to further extrapolate from this data the same level of monthly sales by Defendant from January 2000 through October 2002, resulting in the sale of a total of 1,640 containers between January 2000 and May 2003. There is no basis in the record for the Court to do so. There is no evidence which would allow the Court to even estimate Defendant's sales in 2000. The record contains orders for microdermabrasion crystal which date only from January 2001. (See Pl.'s Ex. 1.) Similarly, the orders for the plastic containers in which the product was packaged date only from January 2001. (See Pl.'s Ex. 4.) Finally, the records indicating the revenue Defendant derived from her business date only from January 2001. The Court can therefore reasonably infer only that Defendant was selling CRYSTAL CLARITY for the period beginning in January 2001 through May 2003. By applying the previously derived rate of sales of forty containers of CRYSTAL CLARITY per month, for the period from October 2002 through May 2003, to the twenty-one months prior to October 2002 for which sales can be inferred, it is reasonable to conclude that Plaintiff sold 840 containers of CRYSTAL CLARITY (21 weeks x 40 containers), for a net profit of \$41,328.00 (840 containers at \$49.20 profit per container). Added to the post-October 2002 profit of \$15,744, it can reasonably be concluded that Defendant earned a total net profit of \$57,072.00 on sales of CRYSTAL CLARITY for the entire

period from January 2001 through May 2003.

This profit was derived from Defendant's improper sale of CRYSTAL CLARITY and use of the CRYSTAL CLARITY trademark, both of which were corporate assets of BBI.⁹ Had Defendant not sold the goods for her own benefit, the profits would have accrued to BBI. Plaintiff is therefore entitled to recover the profit it lost from Defendant's breach of fiduciary duty, in the amount of \$57,072.00.¹⁰

2. Defendant's Income from Cosmetic Procedures and Services

Plaintiff also seeks damages based on the total revenue Defendant earned from her independent businesses. Defendant operated a clinic in Florida where she performed various cosmetic procedures, including dermaplaning and facial peels. (See Messenger Dep. at 16.)¹¹ Defendant also worked in a physician's office in New York on a part-time basis (one full day and two half days every other week), performing various skin treatments. (See id. at 23, 54.) She utilized CRYSTAL CLARITY in some of those procedures, and was paid by the clients, not by the physician in whose office she

⁹ The record indicates that Defendant sold other products under the CRYSTAL CLARITY mark. (See Messenger Dep. at 17-21.) Because there are no records relating to those sales, the Court has not recommended the award of damages based on those sales.

¹⁰ Defendant's sale of CRYSTAL CLARITY over the Internet, in the amount of \$8,785.96, is not added to the net profit figure because the net profit figure presumably reflects the sale of containers both over the Internet and in the other locations where Defendant worked.

¹¹ Defendant worked in her Florida clinic one or two half days per month. (See Messenger Dep. at 53.)

worked. (See id. at 35, 40.)¹² On a full day, Defendant would normally see twenty clients, and on half days she would see ten clients. (See id. at 42.) The procedures Defendant performed cost between \$150 and \$1,500. (See id. at 42-43.) Utilizing entries from Defendant's appointment book for three months in 2003 (see Pl.'s Ex. 6), Plaintiff asks the Court to infer that for the entire three-year period at issue, Defendant saw an average of eighteen paying customers per day, most of whom received micro peels which employed CRYSTAL CLARITY.¹³ At \$150 per procedure, Plaintiff contends that working four days per month in the New York physician's office, Defendant earned approximately \$10,800 per month, and a total of \$442,800.00 during the period from January 2000 through May 2003.¹⁴ Plaintiff asks the Court to further

¹² CRYSTAL CLARITY, in addition to a number of other products employing the CRYSTAL CLARITY mark, was sold in the physician's office and at Defendant's clinic. (See id. at 18-21, 25, 40.)

¹³ Although Defendant claimed at her deposition that she only used CRYSTAL CLARITY in face peels where the patient had acne (see Messenger Dep. at 34-36), her testimony was not credible. There is no evidence that CRYSTAL CLARITY was developed solely for the treatment of acne. In fact, when Defendant performed facials on Ms. Lucka and her friends, who were clients of Defendant, she regularly used CRYSTAL CLARITY in dermaplaning and facial peels, without regard to whether the client had acne. (See Tr. at 35, 37, 38.) Moreover, on her website, Defendant specifically promoted the "CRYSTAL CLARITY peel". (See Pl.'s Ex. 5.) The website listed a litany of conditions which were treatable with CRYSTAL CLARITY Microdermabrasion Cream, only one of which was acne.

¹⁴ Plaintiff also relies on several handwritten pages on which is recorded the amounts Defendant deposited to her bank

assume that Defendant earned at least twice as much through her clinic in Florida as she did working part-time in New York, and therefore seeks an additional \$885,600.00 in damages.

There is insufficient evidence in the record to make such an award. The only evidence as to the amount of time Defendant worked in her Florida clinic is her testimony that she worked there one or two half days per month. (See Messenger Dep. at 53.) There is therefore no basis to award damages based on Plaintiff's unsupported contention that Defendant worked in her Florida clinic at least four days each month. (See Plaintiff's Revised Findings, ¶ 19.) Moreover, there is no basis to conclude that Defendant saw as many clients (let alone twice as many) in her clinic in Florida as she did at the physician's office in New York.

However, there is a more fundamental problem with this claim for damages. As an initial matter, the Complaint makes no allegations about the relationship between the sale of CRYSTAL CLARITY and Defendant's performance of skin care services (and associated income from her practice). Rather, the entire focus of the Complaint is on Defendant's sale of CRYSTAL CLARITY skin care products, which, along with the Trademark, belonged to BBI. (See Compl. ¶¶ 16, 26-27, 40, 44-45, 54.) To the extent that Defendant

accounts on a monthly basis, for almost every month between January 2001 and May 2003. These monies were derived from Defendant's businesses and totaled \$233,831.84. (See Pl.'s Ex. 3.)

was selling CRYSTAL CLARITY and passing it off as BBI's, the Court has already quantified Defendant's profits from such activity, and determined that Plaintiff is entitled to them.

The Court is not convinced, however, that there is a sound basis for awarding Plaintiff all of the several hundred thousand dollars earned by Defendant in performing facial procedures during the three-year period from 2000 through 2003. The Court fails to see how Defendant's use of CRYSTAL CLARITY in the procedures she performed breached any fiduciary duty to BBI, other than in depriving it of the profits it would have earned from the sale of the product. Defendant had been a skin care specialist long before she went into business with Ms. Lucka. It was her profession, and one in which she had become an expert. There is no basis to conclude that she was precluded from continuing to practice her profession because of her involvement with Plaintiff, or that in doing so she was breaching her fiduciary duty to BBI. Clearly, she was not competing with BBI, because BBI was not in the business of performing facial procedures. Rather, what appears to have been contemplated by the parties is that Defendant, through her skin care network, would promote CRYSTAL CLARITY as a product to her clients. Indeed, what little evidence there is in the record suggests that BBI's sales were dependent upon Defendant's promotion of CRYSTAL CLARITY, rather than Defendant's dependence on CRYSTAL CLARITY for her income.

Nor was Plaintiff usurping a corporate opportunity of BBI's by performing facial procedures, even if she did utilize CRYSTAL CLARITY in some of those procedures. "The corporate opportunity doctrine prohibits a corporate employee from utilizing information obtained in a fiduciary capacity to appropriate a business opportunity belonging to the corporation The doctrine's application is limited, however, to business opportunities in which the corporation has a 'tangible expectancy' which means something much less tenable than ownership, but, on the other hand, more certain than a desire or a hope." Am. Fed. Group, 136 F.3d at 906. To reiterate, "BBI [was] in the business of developing, having manufactured, marketing, offering for sale, and selling skin care products." (Compl. ¶ 13.) It had no track record in the facial procedure business; indeed, it was a fledgling company even with respect to the sale of product. There is simply no basis to conclude that, but for Defendant's conduct, BBI would have reaped hundreds of thousands of dollars in profit through the performance of facial procedures on Defendant's clients in New York and Florida. In the Court's view, to award all of Defendant's earnings from her profession and services to Plaintiff, under these circumstances, would result in an unjustified windfall.

Finally, relying on Section 360-m of the General Business Law, Plaintiff seeks treble damages. (See Supplemental Conclusions of Law, ¶ 7.) However, as discussed, the remedies provided for in

Section 360-m are only available to parties who have registered their trademark under the provisions of that law. See N.Y. Gen. Bus. Law § 360-m (where "[a]ny owner of a mark registered under this article . . . proceed[s] by suit [t]he court, in its discretion, may enter judgment for an amount not to exceed three times such profits and damages") (emphasis added). Plaintiff did not register the CRYSTAL CLARITY mark under the provisions of the General Business Law. See N.Y. Gen. Bus. Law §§ 360-b & -c. Accordingly, there is no basis for the award of treble damages.

III. Attorneys' Fees

Plaintiff seeks an award of attorneys' fees, pursuant to Section 360-m of the General Business Law, which provides, inter alia, that "[t]he court, in its discretion, may enter judgment for . . . reasonable attorneys' fees of the prevailing party in such cases where the court finds the other party committed such wrongful acts with knowledge or in bad faith or otherwise as according to the circumstances of this case." N.Y. Gen. Bus. L. § 360-m. Plaintiff also seeks its attorneys' fees as a sanction for Defendant's "bad faith litigation conduct." (Revised Findings, ¶¶ 28-29.) As discussed, the remedies provided for in Section 360-m are not available here because that provision only applies in cases where the owner's trademark is registered under the provisions of the New York Business Law. It is undisputed that Plaintiff's

trademark was not registered under Sections 360-b and c of the General Business Law.

The Court need not resolve the issue of Plaintiff's entitlement to attorneys' fees resulting from Defendant's litigation conduct, because Plaintiff simply has not provided sufficient information to the Court to allow for the award of attorneys' fees under applicable Second Circuit law. In the Second Circuit, a fee application must be supported by contemporaneous time records that "specify, for each attorney, the date, the hours expended, and the nature of the work done." Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (citing N.Y. State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983)); accord F.H. Krear & Co. V. Nineteen Named Trustees, 810 F.2d 1250, 1262 (2d Cir. 1987) ("the requesting party must submit contemporaneous time records specifying the nature of the work done, when it was done, and the time expended on various tasks."); Sheehan v. Metro. Life Ins. Co., No. 01 Civ. 9182 (CSH), 2006 WL 2463550, at *1 (S.D.N.Y. Aug. 23, 2006) (same); Sony Music Entm't Inc. v. Pedestal Prods., Inc., No. 01 Civ. 4033 (RLC) (FM), 2002 WL 1226861, at *4 (S.D.N.Y. Apr. 9, 2002) (same). To determine whether an attorney's time was reasonably spent, the court must evaluate the tasks and the time documented in counsel's contemporaneous time records in light of its general experience and its experience with the case. See Kirsch, 148 F.3d at 173; N.Y.

State Ass'n for Retarded Children, 711 F.2d at 1146-48; Santa Fe Natural Tobacco Co., Inc. v. Spitzer, Nos. 00 Civ. 7274 (LAP), 00 Civ. 7750 (LAP), 2002 WL 498631, at *3 (S.D.N.Y. Mar. 29, 2002); Toys "R" Us, Inc. v. Abir, No. 97 Civ. 8673 (JGK), 1999 WL 61817, at *1 (S.D.N.Y. Feb. 10, 1999).

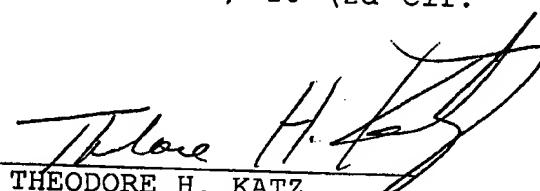
The records Plaintiff's counsel submitted to the Court are wholly inadequate. (See Pl.'s Ex. 7.) They are simply billing invoices which set forth the number of hours worked and the hourly fee, without describing in any manner the nature of the work performed or the amount of time spent on various tasks. Similarly, the invoices merely provide amounts spent for disbursements, without describing the reasons for the disbursements. The Court is unable, on the basis of these records, to determine whether the time spent by Plaintiff's counsel was reasonable, or whether the costs incurred should be reimbursed. Accordingly, the Court recommends that there be no award of attorneys' fees or costs.

CONCLUSION

For the reasons set forth above, the Court recommends that Plaintiff be awarded damages in the amount of \$57,072, reflecting the profits it lost as a result of Defendant's breach of fiduciary duty in selling CRYSTAL CLARITY for her own benefit. The Court further recommends that there be no trebling of the damages and that there be no award of attorneys' fees or costs.

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72 of the

Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Wood. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 812, 115 S. Ct. 86 (1994); Frank v. Johnson, 968 F. 2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).


THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

Dated: December 15, 2006
New York, New York

Copies sent to:

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent No. 6,290,976

Issued: September 18, 2001

Application Serial No. 09/544,636

Name of Patentee: Messenger, Donna

Atty. Doc. No. 120-095

Title of Invention: FACIAL SKIN DERMABRASION CLEANSING AND CONDITIONING
COMPOSITION

Honorable Director of Patents and Trademarks
P.O. Box 1450
Alexandria, VA 22313

DECLARATION OF LYNN LUCKA

I, Lynn Lucka, hereby declare as follows:

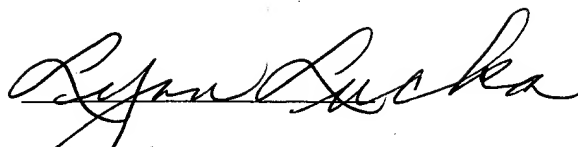
1. I am a founder and presently the president and sole-owner of Bella Bella, Inc., ("Bella Bella") a company formed to make and sell a facial skin cleaning composition.
2. I have worked as a formulating bench chemist for over 30 years for my own companies.
3. Sometime in the late 1990's, I visited my dermatologist and received a facial skin cleaning procedure called a Power Peel – a mechanical bombardment of the face by fine, medical grade, anti-bacterial aluminum oxide crystals to create thorough exfoliation. In part because of its use of a mechanical process, the Power Peel was both expensive, and susceptible to causing abrasions and lacerations to the skin.
4. I was concerned with the Power Peel's non-moisturizing application and use of an expensive machine. I immediately began to look for an alternative treatment for use by non-professionals (and perhaps even professionals) that would have the same skin-polishing effects without causing damage to the facial skin or local

facial membranes and that did not require the use of an expensive application machine

5. I soon focused my efforts on conceiving a cost-effective "at home" product which would contain aluminum oxide crystals in a suitable cosmetic carrier.
6. Due to my chemistry background, I quickly developed a suitable cosmetic carrier for my new composition.
7. Concurrently, I obtained aluminum oxide crystals for the formulation from Ms. Donna Messenger ("Ms. Messenger"), the aesthetician at the dermatologist office where I first received the Power Peel procedure. It was with these crystals that I was able to fully produce a working prototype of my cosmetic product.
8. With the ongoing help of Ms. Messenger, the initial formula was constantly improved by adding different ingredients.
9. Bella Bella, Inc. was formed by me and Ms. Messenger to make and sell this formula. Unfortunately, due to differences in opinion of how to best market the product, our personal and business relationship soon soured, and Ms. Messenger and I ceased working together.
10. On April 6, 2000, Ms. Messenger filed a patent application entitled "Facial Skin Dermabrasion Cleansing and Conditioning Composition." The application was assigned serial number 09/544,636. This application resulted in United States Patent No. 6,290,976 ("the '976 patent").
11. However, at the time of filing, Ms. Messenger did not assign the patent to our company Bella Bella, nor, more importantly, did Ms. Messenger list me as a co-inventor.
12. Following a lawsuit between Bella Bella and Ms. Messenger, Ms. Messenger assigned all rights to the '976 patent to Bella Bella.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 23th day of March, 2007.



Lynn Lucka



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT

In re Patent No. 6,290,976

Issued: September 18, 2001

Application Serial No. 09/544,636

Name of Patentee: Messenger, Donna

Atty. Doc. No. 120-095

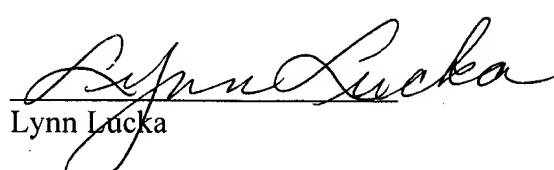
Title of Invention: FACIAL SKIN DERMABRASION CLEANSING AND CONDITIONING
COMPOSITION

STATEMENT OF INVENTOR BEING ADDED
(37 CFR § 1.324(b)(1))

I, Lynn Lucka, hereby declare that the inventorship error of failing to include myself as a co-inventor on the above-identified patent occurred without any deceptive intent.

I declare further that all statements made herein of my own knowledge are true and that all statements made in information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statement may jeopardize the validity of the patent issuing thereon.

Dated: 3/23/07


Lynn Lucka

UNITED STATES PATENT AND TRADEMARK OFFICE
Certificate

Patent No. 6,290,976 B1

Patented: September 18, 2001

On petition requesting issuance of a certificate for correction of inventorship pursuant to 35 U.S.C. 256, it has been found that the above identified patent, through error and without any deceptive intent, improperly sets forth the inventorship.

Accordingly, it is hereby certified that the correct inventorship of this patent is: Donna Messenger, Sarasota, FL (US); and Lynn Lucka, New York, NY (US).

Signed and Sealed this Seventh Day of August 2007.

WILLIAM R. DIXON, JR.
Special Program Examiner
Technology Center 1600



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT

In re Patent No. 6,290,976

Issued: September 18, 2001

Application Serial No. 09/544,636

Name of Patentee: Messenger, Donna

Atty. Doc. No. 120-095

Title of Invention: FACIAL SKIN DERMABRASION CLEANSING AND CONDITIONING
COMPOSITION

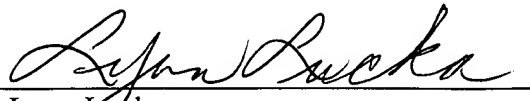
STATEMENT OF CURRENT NAMED ASSIGNEE
(37 CFR § 1.324(b)(3))

Bella Bella, Inc., as assignee of the entire interest of patent no. 6,290,976, as indicated by the assignment recorded with the United States Patent and Trademark Office at reel number 013813, frame number 0783, hereby agrees to add Ms. Lynn Lucka as a co-inventor of the above mentioned patent.

All statements made herein of my own knowledge are true and that all statements made in information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

Date:

3/23/07


Lynn Lucka
President, Bella Bella, Inc.



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

DATE: June 5, 2007
TO: Certificates of Correction Branch
FROM: William R. Dixon, Jr.
Technology Center 1600
SUBJECT: REQUEST FOR CERTIFICATE OF CORRECTION

Please issue a Certificate of Correction in U. S. Letters Patent No. 6,290,976 as specified on the attached Certificate.

A handwritten signature in black ink, appearing to read "William R. Dixon, Jr.", is written over a horizontal line.

William R. Dixon, Jr.
Technology Center 1600

**UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE**

Patent No. 6,290,976 B1

Patented: September 18, 2001

On petition requesting issuance of a certificate for correction of inventorship pursuant to 35 U.S.C. 256, it has been found that the above identified patent, through error and without any deceptive intent, improperly sets forth the inventorship.

Accordingly, it is hereby certified that the correct inventorship of this patent is: Donna Messenger, Sarasota, FL (US); Lynn Lucka, New York, NY (US)

Signed and Sealed this Seventh Day of August 2007.

William R. Dixon, Jr.
Special Program Examiner
Technology Center 1600